IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE P.R.RAMAN
&
THE HONOURABLE MR. JUSTICE V.K.MOHANAN

THURSDAY, THE 20TH SEPTEMBER 2007 / 29TH BHADRA 1929

RFA.No. 265 of 2007()

OS.200/1994 of SUB COURT, MUVATTUPUZHA
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APPELLANT/PLAINTIFF IN SUIT

C.P.POULOSE,S/O.PAULOSE, CHEMBAKKOTTU
KUDIYIL HOUSE,PWD.,CONTRACTOR,AYAKKAD KARA,
THRIKKARIYOOR VILLAGE,KOTHAMANGALAM TALUK.

BY ADV. SRI.K.JAYAKUMAR
SRI.P.B.KRISHNAN

RESPONDENTS: DEFENDANTS
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1. THE STATE OF KERALA, REP.BY
THE CHIEF SECRETARY TO THE GOVERNMENT OF KERALA,
GOVERNMENT SECRETARIAT, THIRUVANANTHAPURAM.

2. THE SUPERINTENDING ENGINEER,OFFICE OF
THE SUPERINTENDING ENGINEER,BUILDINGS AND LOCAL
WORKS,CENTRAL CIRCLE,MISSION QUARTERS,T.B.ROAD,
THRISSUR.

THIS REGULAR FIRST APPEAL HAVING COME UP FOR ADMISSION, ON 11/09/2007, THE COURT ON 20/09/2007 DELIVERED THE FOLLOWING:

P.R.RAMAN & V.K.MOHANAN, JJ.

R.F.A.NO.265 OF 2007

Dated this the 20th day of September, 2007

JUDGMENT

Raman, J.

Plaintiff is the appellant. He instituted the suit O.S.No.200/94 on the file of the Subordinate Judge's Court, Muvattupuzha for declaration and recovery of money. According to the plaint averments, the plaintiff entered into an agreement with the Superintending Engineer, Buildings and Roads, Central Circle, Aluva on 5/2/1983. He undertook the construction of the building for the Government High School, Muvattupuzha. The work was subsequently transferred to the 2nd defendant on bifurcation of the Public Works Department into P.W.D.(Buildings and Local works). According to him, he completed the work of the school building as per the specification and design approved by the department . Subsequently, after inspection, certain modifications were said to have been suggested in the formation of the play ground deviating from the approved plan and specifications and he was asked to stop the work until the new proposals are finalised. He stopped the work and informed the defendant of the same and sought

for instruction to complete the work. According to him, the work was delayed due to the fault of the 2nd defendant. He was not paid the part bill payment for the work completed. In spite of request, the 2nd defendant-Engineer did not take the measurement; but demanded to complete the work as per the new proposal. Ultimately, the plaintiff was served with notice of termination by the 2nd defendant stating that the contract is terminated and the security deposit is forfeited. After notice, the suit was laid for recovery of an amount of Rs.2,30,000/- for the work done till 10/3/1989 with interest thereon at 18% per annum totalling to Rs.2,68,000/- from the date of the suit and praying for future interest at 18% per annum.

2. The defendants contended that the suit is not maintainable and the same is barred by limitation. According to them, the work was entrusted with the plaintiff; but the plaintiff dragged the work for more than 7 years and only completed part of the building work and play ground, in spite of extension of time upto 31/3/1989. He was not earnest in completing the work. Originally the time of completion of work is 18 months from the date of handing over; but he failed to do so. He stopped

the execution of the work. Though a notice was issued to him requesting to resume the work; he was not ready. Hence the contract was terminated as per order dated 22/8/1985. Later the plaintiff came and undertook that he will immediately resume the work and complete the same within two months. Taking a lenient view, the termination order was cancelled and the time of completion of the work was extended upto 30/6/1987, after imposing a fine of Rs.100/-. Even after that he failed to complete the work. The allegation of direction to stop the work on 10/3/1989 was denied. According to the defendants, they had given all assistance to the plaintiff and justified the termination of the contract. According to them, no payment was due to the plaintiff. The 2nd defendant, in such circumstances, took steps for re-arranging the balance work by another contractor at higher rates incurring excess costs. That cost was incurred by the department, due to the default committed by the plaintiff in not completing the work in time. The department paid the excess costs so incurred of Rs.2,59,585/-, which is different from the tender price. The plaintiff was given notice directing him to pay the amount of Rs.2,59,585/-. But he did not remit the same. So, revenue recovery action

was initiated. The suit notice has been duly replied. Plaintiff has no cause of action.

3. The court below framed necessary issues including as to whether the suit is barred by limitation.

4. The evidence consists of oral testimony of PWs.1 and 2, and Exts.A1 and A2 and X1 to X7 were marked in this case. Originally the suit was filed for recovery of money of an amount of Rs.2,68,000/- with future interest at 18% per annum. The suit was subsequently amended by incorporating a prayer for a declaration that the order of termination of the contract of the plaintiff by 2nd defendant is illegal and sustainable. The defendants stated that the suit is barred by limitation. Admittedly,the suit was instituted on 8/7/1994 and the order of termination is dated 28/4/1990. Admittedly, the suit was laid beyond three years from the date of the termination order. It is also found that the plaintiff has not claimed the amount alleged to be due to him within three years and as the challenge against the termination is barred by limitation, further relief claimed by the plaintiff also cannot be sustainable. It was on these reasoning that the suit was dismissed.

5. The court below also found that Rs.2,68,000/-,the amount claimed, is the balance amount alleged to be due to the plaintiff as on 31/3/1989 for the work done by him. The period of completion of the work originally fixed was 18 months. Ext.X1 is the agreement dated 5/2/1983. The subsequent agreement, Ext.X2 is dated 27/1/1987. By the supplemental agreement the date fixed for completion of the work was upto 30/6/1987. Since the suit for termination of the contract as well as for claiming the amount was not instituted within a period of three years, the court below held that the suit is barred by limitation. The correctness of the said view is challenged in this appeal.

6. Learned Counsel, Sri P.B. Krishnan, appearing on behalf of the appellant would contend that there was an original petition as O.P.No.10674/1994 filed by the appellant herein before this Court challenging Ext.P1 communication calling upon him to remit a sum of Rs.2,59,585/-, being the damages alleged to have been suffered by the defendants for non-completion of the work, subsequent to which they have entrusted the work with another contractor. Revenue Recovery proceedings were initiated against him. It was at that time he came to this

Court by filing the original petition. This Court held that the proper course to adopt is to keep the proceedings under the Revenue Recovery Act in abeyance until the suit O.S.No.200/94, i.e. the present suit, is finally disposed of. To protect the interest of the State in view of the stay granted against the revenue recovery proceedings, there was a direction that the petitioner shall furnish a bank guarantee or adequate immovable property by way of security to the satisfaction of the 2nd respondent in the original petition and the stay granted against the revenue recovery proceedings was conditioned upon such furnishing of the bank guarantee, failing which it was held that the State will proceed to recover the amount. It is true that a counter claim for the damages was not filed by the State in the present suit. According to the counsel appearing for the appellant, he has made averments in the plaint challenging the State's action for recovering the damages, said to have been suffered by them, from the appellant and the suit against such challenge is not barred by limitation, even if the other prayers are held to be barred. According to the learned counsel, the court below could have granted the relief as against the damages sought to be recovered from him. But admittedly there was no

prayer made in the suit. The prayer made in the suit is to the following effect:

> "That this Court be pleased to pass a decree declaring that the order of termination of the contract of the plaintiff by the defendant dated 28/4/1990 is illegal and allowing the plaintiff to realise an amount of Rs.2,68,000/- with interest at 18% for the principal amount of Rs.2,30,000/- from the date of the suit till realisation and the cost of the suit."

7. In other words, there was no prayer made as against the damages claimed by the respondents nor any court fee paid and therefore, the contention as against damages does not arise for any consideration in the present suit as laid.

8. In the facts and circumstances and in the light of the pleadings made by the parties and the relief sought for, the suit with a prayer for declaration that the termination of the contract is bad and for claiming the amount for the part work done by the plaintiff, admittedly was not filed within a period of three years from the date of the cause of action or from the date of the termination order.

9. In such circumstances, the finding of the court below that the suit laid by the plaintiff is barred by limitation, does not call for any

interference and the appeal is accordingly dismissed.

However, this is without prejudice to the right of the appellant/plaintiff, if any, regarding his claim against the damages or the recovery thereof by the defendants.

P.R.RAMAN,
Judge

V.K.MOHANAN,
Judge

kcv.